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IN THE

Supreme Court of the United States

October Term, 1982

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT EARL SAWYER,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Did the State of New York Court of Appeals err as a matter of law when it concluded that respondent's voluntary election to represent himself was not knowing and intelligent?

2. Are the standards set forth in *Faretta* v. *California*, 422 U.S. 806 (1975), sufficiently clear so that courts may intelligently and consistently apply them when defendants clearly and voluntarily choose to represent themselves?

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No.

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PEOPLE OF THE STATE OF NEW YORK,

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against

ROBERT EARL SAWYER,

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On Writ of Certiorari to the State of New York Court of Appeals

BRIEF FOR THE PETITIONER

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays for a writ of certiorari to review the judgment and decree of the New York Court of Appeals in the case of People of the State of New York vs. Robert Earl Sawyer. The judgment was entered on July 2, 1982.

Opinions and Orders Below

The opinion of the New York Court of Appeals is reported at 57 N.Y.2d 12, 453 N.Y.S.2d 418 (1982) and appears in the Appendix at 2a. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department, is reported at 83 A.D.2d 205 and the order appears in the Appendix at 20a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1257(3). The judgment of the New York Court of Appeals was entered on July 2, 1982, affirming the reversal of respondent's conviction by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

Constitutional Provisions Involved

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Statement of the Case

The defendant and respondent herein, Robert Earl Sawyer, was indicted by the Chautauqua County Grand Jury and charged with two counts of murder in the second degree (New York Penal Law § 125.25) for shooting Miss Jeanne Humm twice in the head during a robbery of a general store.

On March 2, 1978, defendant, who had contested his extradition from the State of Maine, was returned to New York State, arraigned and informed of the charges against him. He was also advised that he would be entitled to an attorney at all stages of the proceedings. Defendant, thirty-one years old, had previously been convicted of a felony and had served a prison sentence. At the extradition and the trial that resulted in his prior conviction, defendant had been represented by counsel.

On March 9, 1978, Charles Edward Fagan, Esq., the former Public Defender of Chautauqua County, appeared on defendant's behalf and argued that a conflict of interest existed as a result of a recent exchange of personnel between the offices of the Public Defender and the District Attorney. The trial court noted that the new Public Defender, who had been the Chief Assistant District Attorney, was separated from the case by a prior disassociation order. Defendant was given one week to retain counsel.

On March 16, 1978, Mr. Fagan informed the court that defendant was indigent, and the court appointed an assistant public defender. Defendant responded, "I don't want the Public Defender, Your Honor."

On March 20, defendant reiterated that he refused the counsel assigned. The court informed defendant that he had only two choices: either accept the assignment or proceed *pro se*. Defendant responded that he was not capable of defending himself but nevertheless refused to be represented by assigned counsel. The assistant public defender indicated that defendant refused to cooperate with him.

On March 22, 1978, defendant refused to enter a plea and again rejected the assignment of any assistant public defender. The court repeated the two choices open to defendant, and he persisted in rejecting representation by assigned counsel. The court relieved the Public Defender, declared that defendant was his own lawyer and entered a plea of not guilty for him. The following colloquy then took place:

> The Court: And do you want a lawyer?
>
> Defendant: Yes, Your Honor.
>
> The Court: Then, you have the Public Defender, and I am asking you how you plead to this charge?
>
> Defendant: I cannot plead now, Your Honor, because I cannot accept the Public Defender's Office as counsel.
>
> The Court: I hold him in contempt of Court. The Public Defender—either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?
>
> Defendant: I don't want the Public Defender, Your Honor.
>
> The Court: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.
>
> Mr. Carpenter [Assistant Public Defender]: I take it, an order is entered relieving the Public Defender of

representing Mr. Sawyer at this time? Thank you, Your Honor.

. . . .

The Court: I don't know where you are getting your legal advice, but it's wrong. . . . I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned—

Defendant: I have not chosen—

The Court: You have chosen. I am giving you another chance. You may make your own choice. One, represent yourself. Two, be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any advice that is contrary to what the Courts of this State say, obviously, it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.

The Defendant: I want to put on the record, I am not competent to defend myself, Your Honor.

The Court: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have. Do you think I'm going to saddle the people of this County with a huge legal bill when they have already provided a whole Public Defender's department, with investigatory staff, with good lawyers? Do you really think that you have a right which no other person—no other person has gained? Do you really think so?

Defendant: I might have to take it to a higher Court.

The Court: You will take it to a higher Court, then because right now you have your choice. A plea of not guilty is entered on your behalf. You have 30 days in which to make motions.

On March 27, 1978, in response to an oral bail application, there ensued the following:

The Defendant: I am requesting bail be set, Your Honor.

The Court: I know that you have one previous conviction in this Court. I believe it was possession of marijuana and possession of a weapon. They were consolidated back in 19—

The Defendant: I was not convicted of possession of a weapon.

The Court: The plea to the possession of marijuana covered both indictments that had been returned.

The Defendant: No.

The Court: You did not plead to the weapons.

The Defendant: I was not convicted of possession of weapons.

The Court: Right, right. According to the sentencing minutes, the plea to the one indictment satisfied all. Now, I will tell you what my decision on bail is. A murder charge is very very serious and would require large bail. So, I . . . set no bail in any murder charge. . . . At this time, the Public Defender has pointed out to me that I have not issued a formal order relieving him from the assignment which I made. Is it your desire that you now do so?

The Defendant: Your Honor, it is completely up to you.

The Court: No, I am asking you. Would you please answer me yes, or no.

The Defendant: We have already discussed this at the last hearing.

The Court: Do you want me to relieve the Public Defender?

The Defendant: I do not consent to have him assigned as my counsel.

The Court: And by not consenting, you say as much you would not accept him as your counsel?

The Defendant: That's correct.

The Court: And would not cooperate with him; would not talk to him and accept the services of his department, is that correct?

(Whereupon there was no response from the Defendant.)

The Court: You just don't accept him, period?

The Defendant: I do not consent to have him as my assigned counsel, Your Honor.

The Court: Well, I relieve the Public Defender of the assignment which I have made. Please note for the record that Mr. Sawyer is his own counsel as such. I have instructed the District Attorney to get together everything for discovery as quickly as possible.

On June 10, 1978, the following colloquy took place.

Defendant Sawyer: I would like to say something, Your Honor.

The Court: Certainly.

Defendant Sawyer: I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs. Wainwright: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel (*sic*). Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for

himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court: I have offered you counsel, Mr. Sawyer.

On at least three more occasions before the trial began, the Court offered to make the Public Defender's office available, but defendant stood firm. On March 31, 1978, defendant, *pro se,* brought an Article 78 proceeding to seek assignment of counsel not associated with that office. An amendment was filed on May 21, 1978, seeking an injunction against the proceeding until the original petition was decided. The Appellate Division, Fourth Judicial Department, denied the application.

After a discovery proceeding on July 19, 1978, in which defendant received all discoverable materials, a suppression hearing was held on July 25, 1978. At the close of the hearing, defendant complained that he was experiencing difficulty getting access to a telephone and stated, "Your Honor, I am trying to conduct a defense in my own behalf. . . ."

On October 20, 1978, defendant was found guilty after a trial in which he was shown to be near the scene of the crime. Defendant's Smith and Wesson .41 Magnum re-

volver, recovered from his barn, was determined to be the gun used in the crime. Defendant was sentenced to an indeterminate term of imprisonment of twenty-five years to life.

Upon defendant's appeal of his conviction, the Appellate Division, Fourth Department, by a split court reversed his conviction and granted a new trial on the ground that defendant had been improperly denied a continuing choice of either relying on the assigned attorney or proceeding *pro se*.

Leave to appeal this order was granted by Hon. Dominick L. Gabrielli, Associate Judge, New York State Court of Appeals on December 28, 1981. The order was upheld by a vote of four to three. The Court ruled that the record failed to demonstrate that defendant-respondent knowingly and intelligently decided to proceed *pro se*. The New York Court of Appeals in September 1982 denied a motion to reargue. That order was not drawn up by the Court in time for inclusion in this petition.

Reasons for Granting the Writ

POINT ONE

The New York Court of Appeals improperly decided that defendant-respondent did not intelligently exercise his right to proceed *pro se* because the constitutional standard remains insufficiently defined.

The sanctioning by the New York Court of Appeals of the whipsaw strategy of defendant-respondent, as well as several similar gross misapplications of this Court's rule governing the knowing and intelligent decision to proceed

pro se, suggest that the issue be addressed. It is a direct result of the sole, vague standard set down by this Court in *Faretta* v. *California*, 422 U.S. 816 (1975), and the rule must be further explicated.

A. The *Faretta* Standard Is Inconsistently Applied in the Federal Courts.

This Court's rule on the valid waiver of the right to counsel and the concomitant right to proceed *pro se* was set forth in *Faretta* v. *California*:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

422 U.S. at 835.

The ambiguousness of this standard has resulted in inconsistent and questionable rulings. While some courts require a searching inquiry, others have found a valid decision on self-representation with little or no discussion. *Compare, United States* v. *Tompkins*, 623 F.2d 824 (2d Cir. 1980), and *United States* v. *Romero*, 640 F.2d 1014 (9th Cir. 1981); *Mixon* v. *United States*, 608 F.2d 588 (5th Cir. 1979), *rehearing granted*, 616 F.2d 253 (1980), *vacated on other grounds*, 620 F.2d 486 (1980). Thus, where the trial court failed to inform a defendant of the charges, possible punishment and available defenses, federal courts have split on the validity of a decision to represent oneself. *McKee* v. *Harris*, 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd*, 649 F.2d

927 (2d Cir. 1981), *cert. denied,* 102 S.Ct. 1773 (1982) (held: decision knowing and intelligent; court did inform defendant of option to be represented by attorney and of its advantages); *Mixon* v. *United States,* 608 F.2d 588, 590 (5th Cir. 1979) (held: decision knowing, despite lack of inquiry); *United States* v. *Romero,* 640 F.2d 1014 (9th Cir. 1981) (held: decision knowing, despite fact that extent of inquiry was advice that self-representation would be unwise); *Martin* v. *Wyrick,* 433 F. Supp. 921 (W.D. Mo. 1977), *rev'd on other grounds,* 568 F.2d 583 (8th Cir. 1978), *cert. denied,* 435 U.S. 975 (1978) (held: decision not knowing, notwithstanding repeated assertions of the right to proceed *pro se*). This sample of cases demonstrates the conflict between the Circuit Courts.

There are several reasons for such disparate decisions. Each factor by itself provides an independent basis for this Court to grant certiorari and resolve an increasingly difficult problem for State and Federal trial courts; in the aggregate those reasons overwhelmingly dictate that this Court accept jurisdiction and provide needed guidance, for conflicting decisions are certain to continue.

First, beyond the finding that a defendant's decision is knowing and intelligent, the sole guidance provided in *Faretta* v. *California, supra,* is that it be made with "eyes open." 422 U.S. at 835. "There was . . . no occasion in *Faretta* to lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct in order to determine whether a defendant has 'knowingly and intelligently' chosen to forego the benefits of counsel." *United States* v. *McCaskill,* 585 F.2d 189, 190 (6th Cir. 1978). Without such criteria, similar facts will lead to in-

consonant results. The "eyes open" standard is so elusive as to constitute no standard at all. This Court can cure the floundering by the lower courts by fully explicating circumstances that constitute an "eyes open" decision.

The second reason why the *Faretta* standard has produced conflicting decisions was recognized in the dissenting opinion:

> [T]he opinion leaves open a host of other procedural questions .... Many of them ... such as the standards of waiver and the treatment of the *pro se* defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.

422 U.S. at 852 (Blackmun, J.).

The Fifth Circuit's comment notes the problem of application.

> In delineating those requirements, courts must consider the fundamental nature of the right and the legitimate concern for the integrity of the trial process. Particular requirements can be justified only insofar as they are functionally related to reconciling those interests.

Chapman v. *United States*, 553 F.2d 886, 895 (5th Cir. 1977).

Thus, while a defendant's right to represent himself has been recognized, it remains uncertain in practice. The absence of clear procedures and the failure of *Faretta* to encompass recurring strategies of defendants contribute to the elusive quality of the requirements for validly choosing self-representation. To be sure, no particular form of interrogation or colloquy should be mandated. *United States* v. *King*, 582 F.2d 888, 890 (4th Cir. 1978); *United States* v.

Gillings, 568 F.2d 1307, 1308 (9th Cir. 1978), *cert. denied,* 436 U.S. 919 (1978); *accord, United States* v. *Kimmel,* 672 F.2d 720, 722 (9th Cir. 1982). *Contra, United States* v. *Tompkins,* 623 F.2d 824, 828 (2d Cir. 1980). Despite this recognition, *Gillings, supra,* and *Kimmel, supra,* resulted in reversal or remand of some kind, further illustrating the confusion that reigns. The *Tompkins* court noted, in a typically schizophrenic fashion for this area of appellate review, that "the requirement of such a 'full and calm discussion' is not absolute. . ." Basic "rules of the game" need to be explicated where in hundreds of instances

> whether it be by the design or because of misguidance or naivete on the part of the accused, the trial court lays an appeal or a collateral attack by either a denial or the granting of the request.

United States v. *Dujanovic,* 486 F.2d 182, 185 (9th Cir. 1973).

In *Dujanovic,* despite recognition of the trial court's dilemma—which persists after *Faretta* as evidenced by the abundance of appeals and reversals based on this ground*—application of the pre-*Faretta* "open eyes" criterion resulted in a retrial. Contrariwise, other courts have held that the failure to inform defendant of the risks of proceeding *pro se* may not, in certain circumstances, require reversal. That is, "open eyes" may be demonstrated by other methods. *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied,* 426 U.S. 937, 96 S.Ct. 2652 (1976); *United States* v. *Rosenthal,* 470 F.2d 837, 844-45 (2d Cir. 1972), *cert. denied,* 412 U.S. 909

* This, despite the *Faretta* majority's assumption that once a defendant elected to represent himself, he would be bound by his choice. 422 U.S. at 835 n.46. See dissenting opinion of Chief Justice Burger, 422 U.S. at 846.

(1973). This crazy quilt of cases and emphases in procedure begs clarification and direction from this Court.

A third reason for the conflicts in the federal courts is grounded in the nature of the right to proceed *pro se*. Some courts speak of the right to proceed *pro se* as a waiver of the right to assistance of counsel and so equate it with all other constitutional rights. *E.g., United States* v. *Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982); *United States* v. *Romero*, 640 F.2d 1014 (9th Cir. 1981); *United States* v. *McCaskill*, 585 F.2d 189, 190 (6th Cir. 1978); *United States* v. *Gillings*, 568 F.2d 1307 (9th Cir. 1978); *United States* v. *Warledo*, 557 F.2d 721, 726 (10th Cir. 1977); *United States* v. *Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973). Others have distinguished it from a waiver of a constitutional right; instead, it is a decision to assert one constitutional right instead of another. *See United States* v. *Coupez*, 603 F.2d 1347, 1351 (9th Cir. 1979); *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 134 (2d Cir. 1975). This Court in *Faretta* implicitly recognized that the operational factor involved is an election of rights. Since an attorney may not be thrust upon a defendant, the Court refers to the defendant's "choice" to exercise his right to represent himself. 422 U.S. at 835. The Court recognized this as an independent right, equivalent to representation by counsel. 422 U.S. at 832-33. These diverse views exemplify the confusion that abounds on the appellate level. It must, perforce, exceed that on the trial level where decisions have to be made on a spontaneous basis. Moreover, the results have necessarily been divergent. The distinction between the waiver of a constitutional right—perhaps the most important right to a defendant in a criminal proceeding, the right to counsel—and an election between competing constitu-

tional rights is by no means academic. A waiver would imply a full-blown inquiry into the rights being relinquished and the ramifications of the waiver, including the recognition that a particular penalty may loom and that the task generally requires the ability and background of an attorney. Perceived as an election, a brief review of the risks and possible consequences should ensure an informed decision. The totality of circumstances, so often an aid to courts in their decision concerning a particular event, may reveal facts pertinent to one view and not the other. For example, colloquy may disclose an awareness of the rights being renounced but not of the risks involved, as in the case at bar according to the view of the New York State Court of Appeals.

This Court, we suggest, should address those problems in order to make the law clear, the outcome predictable, and convictions final.

B. The *Faretta* Standard Is Inconsistently Applied in the State Courts.

State courts have also divided with respect to how to conceive of the right to proceed *pro se*. Several have deemed it a waiver of the right to counsel. *Gottshalk* v. *State*, 602 P.2d 448 (Alaska 1979); *Clarke* v. *Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981); *People* v. *Williams*, 96 Ill. App. 3d 519, 421 N.E.2d 551 (1981); *Russell* v. *State*, 383 N.E.2d 309 (Ind. 1978); *State* v. *Carpenter*, 390 So.2d 1296 (La. 1980); *State* v. *Jones*, 266 N.W.2d 706 (Minn. 1978); *Matthews* v. *State*, 394 So.2d 304 (Miss. 1981); *State* v. *Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976); *State* v. *Gustafson*, 278 N.W.2d 358 (N.D. 1979); *State* v. *Trapp*, 50 Ohio App. 189, 368 N.E.2d 1278 (1977). Others have deemed it

an election of a right. *People* v. *Teron*, 151 Cal. Rptr. 633, 588 P.2d 773 (1979); *State* v. *McCabe*, 101 Idaho 727, 620 P.2d 300 (1980); *State* v. *Cunningham*, 222 Kan. 704, 567 P.2d 879 (1977); *State* v. *Edwards*, 592 S.W.2d 208 (Mo. Ct. of App., E.D. 1979); *State* v. *Harvey*, 603 P.2d 661 (Mont. 1979); *Hollis* v. *State*, 601 P.2d 62 (Nev. 1979). These varying perceptions, of course, signify demonstrable differences in the type of warnings required to be given to an accused. To the same effect is *Pickens* v. *State*, 96 Wis.2d 549, 292 N.W.2d 601, 608 (1980), wherein the Supreme Court of Wisconsin reviewed *Faretta* v. *California*, *supra*, and *Maynard* v. *Meachum*, 545 F.2d 273 (1st Cir. 1976), and concluded that "there is no particular piece of information that is essential to an effective waiver of counsel."

For example, in *State* v. *Gustafson*, 278 N.W.2d 358 (1979), North Dakota, a jurisdiction that defines the right as activated by a waiver, held that if a defendant comprehends the right to counsel and makes no request for counsel, he has waived counsel. In *State* v. *Harvey*, 603 P.2d 661 (1979), Montana, a state that has defined the right as a choice or election, held that advising of the risks of self-representation will suffice. In *Burton* v. *State*, 543 S.W.2d 761 (Ark. 1976), refusal to accept appointed counsel because he suggested defendant plead guilty constituted a valid election. These disparate results similarly call for review and clarification by this Court.

The inconsistent results and contrary perceptions in the state courts derive directly from the vague language in *Faretta*. As the dissenters, including Chief Judge Givan, noted in *Wallace* v. *State*, 366 N.E.2d 1176 (Indiana 1977),

the trial judge faces a dilemma that will give rise to an appeal no matter what decision is made. *Id.* at 1177.

> It is difficult to justify reversing a conviction on such a vague directive as, "defendant must have his eyes open," without giving the trial court any further guidance. . . . Reversing on such a colloquial formulation, however, without making any further attempt to define it, also implies that this case would be reversed again after remand and retrial. Not only is the 'eyes open' standard vague, but it is also essentially purposeless.

Id at 1179.

The state courts demand clarification of *Faretta.* The dissenters in *Wallace* contend, for example, that the "eyes open" language is advisory only. The confusion that abounds is warranted; this Court should eliminate chaos by granting the writ in the case at bar.

C. There is a Conflict Within the Jurisdiction of the Second Circuit.

The case at bar presents a case in which the trial court exhorted defendant that he was ill-advised to represent himself and informed him of his right to counsel, the seriousness of the charges and the possible punishment. Defendant himself cited the dangers of self-representation to the court by reading from *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). In two cases within the Circuit respective courts failed to inform defendant of the charges and the possible punishment. Nonetheless, where defendant in fact was aware of the risks and was literate and competent, the District Court found, and the Second Circuit upheld, that an informed decision had been made. *McKee* v. *Harris,* 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd,* 649 F.2d 927 (2d Cir.

1981), *cert. denied,* 102 S.Ct. 1773 (1982); *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131 (2d Cir. 1975). This dichotomous situation within a federal circuit demands resolution by the highest Court.

D. The New York Court of Appeals Ignored This Court's Standard and Federal Case Law When It Improperly Ruled That Defendant Did Not Intelligently Choose to Represent Himself.

Although the New York Court of Appeals cited *Faretta* v. *California, supra,* in the instant case, it failed to consider its rule or the progeny of federal case law on intelligence of *pro se* elections. In so doing that court demonstrates the epidemic inability to apply the *Faretta* rule meaningfully and predictably.

The federal courts have, in the absence of guidelines, looked to various factors in evaluating the intelligence of a decision to represent oneself. Thus the courts have examined, *inter alia,* the defendant's familiarity with courtroom procedure and criminal background [*Mixon* v. *United States,* 608 F.2d 588, 590 (5th Cir. 1979); *United States ex rel. Smith* v. *Pavich,* 568 F.2d 33 (7th Cir. 1978); *United States ex rel. Konigsberg* v. *Vincent,* 526 F.2d 131, 134 (2d Cir. 1975), *cert. denied,* 426 U.S. 937 (1976)]; the possible effect lengthy incarceration may have on defendant's state of mind [*United States ex rel. Noll* v. *Fay,* 219 F. Supp. 262, 268 (S.D.N.Y. 1963)]; defendant's educational background [*United States* v. *Warledo,* 557 F.2d 721 (10th Cir. 1977); *United States ex rel. Martinez* v. *Thomas,* 526 F.2d 750, 755 (2d Cir. 1975)]; "sophisticated legal hijinks" [*United States* v. *Romero,* 640 F.2d 1014 (9th Cir. 1981); *Cordoba*

v. *Harris*, 473 F. Supp. 632 (S.D.N.Y. 1979); *United States ex rel. Konigsberg* v. *Vincent, supra*]; a defendant's conduct, including obstreperousness [*United States* v. *Dujanovic*, 486 F.2d 182 (9th Cir. 1973)]; and defendant's literacy and ability to articulate his thoughts [*United States* v. *Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982); *United States* v. *Jones*, 580 F.2d 785, 788 (5th Cir. 1978)].

The case at bar satisfies almost every factor that militates in favor of a finding of an informed decision to conduct a *pro se* defense. Defendant, thirty-one years old, had been previously convicted of a felony and had been represented by counsel at that proceeding and in the lengthy litigation regarding his extradition from Maine to New York leading to the instant prosecution. His familiarity with courtroom procedures and the advantages of counsel were manifest. Defendant was articulate and often opined his inferior ability to conduct his defense while simultaneously eschewing assistance from the office of the Public Defender. These events demonstrate his appreciation of the risks involved in proceeding *pro se*. The choice presented was not constitutionally offensive. *Maynard* v. *Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *Hooks* v. *State*, 416 A.2d 189 (Del. Sup. Ct. 1980). Moreover, defendant had been told at his arraignment that he was entitled to an attorney at all stages of the proceedings. The trial court also advised defendant, as required in most of the federal courts, that the charges were serious, that a life sentence was possible, and that it would be in his best interest to have an attorney represent him. Defendant's recitation of the risks of self-representation as set forth in *Gideon* v. *Wainwright, supra*, was most telling. He nonetheless per-

sisted in declining counsel, again offered him by the trial court. His strategic maneuvering was successful despite the fact that from his own lips he had provided "a far clearer indication of his personal appreciation of the particular risks involved than if the court had uttered the warnings and the defendant merely acknowledged his understanding by a simple 'yes'." (Dissenting Op.) (Jasen, J). Since "the test concerns what the accused understood rather than what the court said or understood, explanations are not required." *United States* v. *Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982), *quoting*, *Cooley* v. *United States*, 501 F.2d 1249, 1252 (9th Cir. 1974). The totality of circumstances governs, and it indicates that defendant, who insisted upon the course he followed and knew his rights, should have been bound to his election.

The instant case presents facts that are essentially congruent to several federal cases that found the *pro se* choice an informed one. Failure to inquire into reasons for defendant's dissatisfaction with counsel was held harmless where the reasons were clear and where defendant's absolute insistence on discharging counsel did not vitiate the validity of defendant's *pro se* election. *McKee* v. *Harris*, 485 F. Supp. 866 (S.D.N.Y. 1980), *aff'd*, 649 F.2d 927 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1773 (1982).

In a case that is on all fours, *United States* v. *Pilla*, 550 F.2d 1085 (8th Cir. 1977), defendant, like Sawyer, knew he had a right to counsel and that he would have to go to trial without counsel if he refused appointed counsel's services. Defendant, like Sawyer, repeatedly stated he did not know how to defend himself. Like Sawyer, he refused to cross-

examine witnesses and put in no defense. Unlike Sawyer, Pilla was held to have "intelligently, voluntarily and effectively waived his constitutional right of representation." 550 F.2d at 1093. *See Wilks* v. *Israel*, 478 F. Supp. 404 (E.D. Wis. 1979), *aff'd*, 627 F.2d 32 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981); *United States* v. *Davis*, 604 F.2d 474 (7th Cir. 1979); *Fillippini* v. *Ristaino*, 585 F.2d 1163 (1st Cir. 1978).

The diametrically opposed results between *Pilla*, *Konigsberg*, *supra*, *Davis*, *supra*, *Fillippini*, *supra*, and *Sawyer* did not derive from a New York Court of Appeals decision to expand defendant's constitutional rights. Instead, the fallacy of the decision in *Sawyer* is rooted in a fundamental misapplication of *Faretta* because of its absence of evidence and, consequently, consistent standards. This ruling ignores the realities of a defendant who has determined his modus operandi and will not be swayed from his course. It ignores the reality confronting the trial court of confusion over the essential quality of the right, i.e., whether it requires a waiver or constitutes an election. The ruling ignores the reality that a defendant may not dictate choice of appointed counsel. *See United States* v. *Davis*, 604 F.2d 474, 479 (7th Cir. 1979); *United States* v. *Burton*, 584 F.2d 485, 489, 490 (D.C. Cir. 1978). Defendant's effort to do so should not be countenanced by means of a hypertechnical application of a vague standard. The decision also elevates the glorification of form over substance to a constitutional level. Thus, unless an unspecified inquiry is made, since due regard is not accorded to the totality of circumstances, a trial and conviction may be invalidated. The absurdity of this result is glaring since the New York Court of Ap-

peals calls for "appropriate colloquy" but never specifies what questions will constitute a "searching inquiry." A trial court may read the *Sawyer* decision today and not be enlightened as to how to avoid reversible error in a similar situation. Finally, the decision below sanctions the type of gamesmanship that can only undermine public confidence in the criminal justice system. See *United States ex rel. Smith* v. *Pavich*, 568 F.2d 33 (7th Cir. 1978), *quoting, Williams* v. *Florida*, 399 U.S. 78, 82 (1969); *Kates* v. *Nelson*, 435 F.2d 1085, 1088-89, *quoting, United States ex rel. Davis* v. *McMann*, 386 F.2d 611, 618-19 (9th Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *People* v. *Sawyer*, 57 N.Y.2d 12, 453 N.Y.S.2d 418, 425 (1982) (dissenting opinion). Such a contortion of logic and justice should not invoke the United States Constitution or the decisions of this Court to accomplish its purpose.

Conclusion

For the foregoing reasons, we respectfully ask that a writ of certiorari issue to review the judgment and decision of the New York Court of Appeals.

Respectfully submitted,

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Remittitur

Order of Affirmance

COURT OF APPEALS

STATE OF NEW YORK

THE HON. LAWRENCE H. COOKE, *Chief Judge, Presiding*

4 No. 401

The People &c.,

Appellant,

v.

Robert E. Sawyer,

Respondent.

The appellant in the above entitled appeal appeared by Hon. John T. Ward, District Attorney, Chautaugua County; the respondent appeared by Fagan, and Sheffield, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Fuchsberg in which Chief Judge Cooke and Judges Jasen and Meyer concur. Judge Jasen dissents and votes to reverse in an opinion in which Judges Gabrielli and Wachtler concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Chautauqua County Court there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 2, 1982.

[SEAL]

Opinion

STATE OF NEW YORK
COURT OF APPEALS

4 No. 401

The People &c.,
Appellant,

v.

Robert E. Sawyer,
Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(401) John T. Ward, DA, Chautauqua County, for appellant.
Charles Edward Fagan, Jamestown, for respondent.

FUCHSBERG, J.:

Once again we face sensitive questions associated with an indigent defendant's *pro se* representation in a criminal case.

After trial by jury, defendant, Robert Earl Sawyer, was convicted, and thereafter sentenced to an indeterminate term of twenty-five years to life imprisonment, on two counts of murder arising out of the fatal shooting of a grocery clerk in Stow, Chautauqua County. Upon arraign-

ment, the County Court, on March 2, 1978, advised him of his right to counsel and gave him a week in which to secure one.

On the adjourned date, March 9, Charles Fagan, Esq., who until shortly prior thereto had occupied the post of Public Defender, in which he apparently had developed some familiarity with the charges against the defendant, appeared with him, but only at the instance of the defendant's family and solely, as he explained to the County Judge, for the purpose of pursuing the representation matter. In particular, anticipating that defendant's indigency would require the County Judge to assign counsel, he advanced the argument that a conflict of interest might render the Public Defender's office ineligible for such an assignment. This he premised on the fact that Fagan's successor as Public Defender, Richard V. Slater, Esq., had come to his new office from service as Chief Assistant District Attorney, thus, in turn, creating a vacancy which was filled when an Assistant Public Defender, Ronald J. Gibb, Esq., shifted his employment to the District Attorney's office. The Trial Judge, who, in his position of course had to have been aware of these personnel changeovers in the relatively well-knit legal community of nonmetropolitan Chautauqua County, rejected Fagan's contention with the observation that the court earlier made a disassociation order which separated Slater from the case. Without further exploration of the subject, the Court then adjourned the case to March 16, so that defendant could determine whether Fagan was to be his lawyer.

When, on this date, Fagan again appeared but only to give the Court formal notification that the defendant lacked

sufficient funds to retain private counsel, the Court announced the appointment of Bruce K. Carpenter, Esq., in his official capacity as Assistant Public Defender under Slater, to represent him. The defendant promptly protested, "I don't want the Public Defender, Your Honor." Four days later, the Court notified the defendant that, after further consideration, it had decided that he was not entitled to counsel of his choice, and therefore would either have to stay with Carpenter or proceed *pro se*. Defendant responded that he was not capable of defending himself, but still refused to be represented by the Public Defender. In the course of the colloquy, Carpenter informed the Court that he had been unable to receive any cooperation from the defendant and suggested the appointment of alternate counsel to follow the case and be present at all proceedings. The Court refused to do so or to appoint Fagan in place of Carpenter.

This as prelude, we move to March 22, when the case again appeared on the calendar, this time for pleading. There ensued the following:

> "The Court: And do you want a lawyer?
>
> Defendant: Yes, Your Honor.
>
> The Court: Then, you have the Public Defender, and I am asking you how you plead to this charge?
>
> Defendant: I cannot plead now, Your Honor, because I cannot accept the Public Defender's office as counsel.
>
> The Court: I hold him in contempt of Court. The Public Defender—either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?

Defendant: I don't want the Public Defender, Your Honor.

The Court: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.

Mr. Carpenter: [Public Defender]: I take it, an order is entered relieving the Public Defender of representing Mr. Sawyer at this time? Thank you, Your Honor.

* * *

The Court: * * * I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned—

Defendant: I have not chosen—

The Court: You have chosen. I am giving you another chance. You may make your choice. One, represent yourself. Two be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any advice that is contrary to what the Courts of this State say, obviously, it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.

Defendant: I want to put on the record, I am not competent to defend myself, Your Honor.

The Court: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have."

On March 27, defendant was denied bail. At that time, he again refused the services of the Public Defender, who thereupon was formally relieved of further responsibility to the defendant in this exchange:

"The Court: * * * At this time, the Public Defender has pointed out to me that I have not issued a formal order relieving him from the assignment which I made. Is it your desire that you now do so?

Defendant: Your Honor, it is completely up to you.

The Court: No, I am asking you. Would you please answer me yes, or no.

Defendant: We have already discussed this at the last hearing.

The Court: Do you want me to relieve the Public Defender?

Defendant: I do not consent to have him assigned as my counsel.

The Court: And by not consenting, you say as such you would not accept him as your counsel?

Defendant: That's correct.

The Court: And would not cooperate with him; would not talk to him and accept the services of his department, is that correct?

(Whereupon there was no response from the defendant.)

The Court: Is that correct?

(Whereupon there was no response from the defendant.)

The Court: You just don't accept him, period?

Defendant: I do not consent to have him as assigned counsel, Your Honor.

> The Court: Well, I relieve the Public Defender of the assignment which I have made. Please note for the record that Mr. Sawyer is his own counsel as such."

On at least three subsequent occasions before the trial proper eventually got under way, the court offered to make the Public Defender's office available, but the defendant was unswerving in his insistence that, while he desired counsel, he would not accept one from the Public Defender's Office.[1] When his counsel-less defense did take place, the defendant proved the truth of his protestation that he was not competent to represent himself; neither disrespectful nor disorderly, he simply showed no comprehension of the applicable evidentiary or substantive law. In effect, the trial was an inquest.

It was essentially on this record that a sharply divided Appellate Division reversed and granted a new trial. In a writing by Justice Schnepp, the majority reasoned that, granted that an indigent did not have the right to select his assigned counsel, the Trial Judge had properly denied defendant's request, but that, when he relieved Carpenter from further responsibility, the Trial Court improperly deprived the defendant of a continuing choice of either relying on counsel or proceeding on his own. In contrast, the two dissenting justices opined that the defendant effectively waived the right to counsel (83 AD2d 205). Though on a somewhat different rationale than the one it adopted,

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1. The defendant even went so far as to bring an Article 78 proceeding against the trial judge to seek assignment of counsel not associated with the Public Defender. The Fourth Department denied the application. (Appeal dismissed, 45 NY2d 835).

we believe the result the majority reached is the one that should be upheld.

Our analysis begins with the observation that it was incumbent upon the defendant to show "good cause" for the desired substitution. For, while it is true that an indigent defendant is guaranteed the right to assistance of counsel by both our Federal and State Constitutions,[2] this is not to be equated with a right to choose counsel. Thus, while trial judges have a duty to carefully evaluate complaints concerning court-appointed counsel and, when appropriate, effect a change of counsel, "this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually" (*People v Medina*, 44 NY2d 199, 207; see *People v Brabson*, 9 NY2d 173, 180-181).

Therefore, though a defendant's confidence in appointed counsel is most desirable, as it is in any client-attorney relationship, a bald profession that it is lacking is not controlling. Good cause for such an opinion must be demonstrated before a substitution need follow. It goes without saying, for instance, that most compelling would be a showing that counsel is unable to provide the defendant effective assistance, as, for example, by reason of professional incompetence or the existence of a personal impediment which handicaps his or her professional performance. Surely, a genuine conflict of interest would entitle a defendant to relief.

In the case before us now the only objection raised was the one broadly uttered under the conflict of interest rubric.

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2. NY Const, art I, §6; *People v Koch*, 299 NY 378, 381; US Const, 6th and 14th Amdts; *Argersinger v Hamlin*, 407 US 25; *Gideon v Wainwright*, 372 US 335.

At no time was there anything to even slightly suggest that any of the former members of either the District Attorney's staff or that of the Public Defender who recently had shifted their employments from one of these agencies to the other would not zealously honor the confidences and loyalties assumed in their original positions. Rather, the County Judge made it known to the defendant that he had been circumspect enough to issue a disassociation order which presumably was tailored to minimize the risk, if not entirely avoid the occasion for any occurrence of conflict in fact. And, we note that the Appellate Division, alert to our admonitions in *People v Shinkle* (51 NY2d 417), thought the Trial Judge could draw a distinction between the circumstances created in *Shinkle,* where a defense counsel had joined the prosecutor's office and the converse here, where one formerly allied with the prosecutor had taken over direction of the Public Defender's domain. Finally, absent any oral or written definition of the specifics of the disassociation order or any information on Carpenter's prior vocational history, with neither of which the record here favors us, it can be argued that the details of the order in fact may have mandated a foolproof disassociation procedure and that Carpenter's background and intended modus operandi would have reinforced it.

But then, of course, less summary treatment of the matter than the record revealed could have disclosed a less ideal drawing of disassociation lines or, for instance, allowed for exploration of the relationship, if at all, of Gibbs' successive employments to the handling of defendant's case. Beyond all this, however, "even if the actuality * * * of

prejudice were absent, what of the appearance of things (see Code of Professional Responsibility, Canon 9)?" (*People v Zimmer*, 51 NY2d 390, 395). Or, as *Shinkle*, in its more analogous context, explains, "We recognize that the rule applied in this case may impede the transfer of attorneys between offices of Legal Aid or Public Defender and of District Attorney. This circumstance, however, affords no basis to deny the defendants the right to both the fact *and appearance* of unswerving and exclusive loyalty on the part of attorneys who represent them" (emphasis added) (*Shinkle, supra*, p 421).

Obviously then, to say the least, a fine line here had to be tread. But we need not decide whether it was. This is because a new trial is necessary in any event, since, as we read the record, the Trial Court did not ascertain that the defendant appreciated the risks of self-representation.

For, even if we assume the defendant's request for other counsel was properly denied, in the posture of the two options to which he was confined, his unwillingness to accept Carpenter as counsel left the defendant no way to proceed but *pro se*. This then called upon the Court to give the defendant appropriate warnings. Clearly, this requirement was not diminished because the defendant chose to become a *pro se* litigant because of the strictures of the options open to him rather than in the absence of such restraint. Whatever his displeasure at having to make such a choice, when it ultimately was made, it was unequivocal. Indeed, it can be said that his decision was no less, but perhaps more, definite because it was evidenced by conduct rather than the mounting of a verbal formula.

Opinion

At the root of the rule calling for special inquiry before a defendant may proceed *pro se* is recognition that implicit in a defendant's exercise of the right to do so is a commitment to forego the advantages of counsel (*Faretta v California*, 422 US 807, 835). To make sure this is well understood, more is required than that the right be "unequivocally and timely asserted". Substantively, it must be "knowing and intelligent" as well. (*People v McIntyre*, 36 NY2d 10, 17). To ascertain that it is, the court should undertake a sufficiently "searching inquiry" of the defendant to be reasonably certain that the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on the defendant (see *Faretta v California*, 422 US 807, 834, *supra*; *People v White*, —— NY2d ——, decided May 20, 1982, slip opinion p 6). Appropriate "colloquy on the record between the judge and the defendant" will not only test the defendant's understanding, but provide an objective basis for review (*United States v Bailey*, —— F2d —— [31 Crim L Rep 2225]; see *United States v Dujanovic*, 486 F2d 182; *United States v Plattner*, 330 F2d 271).

So measured, the precautionary inquiry in this case was woefully inadequate. In the main, the dialogue consisted of repeated judicial importunities that the defendant accept the services of the Public Defender and their repeated rejection by the defendant. The Court's declarations that defendant was "facing a very serious charge" and that "your own best interests are probably served by having a lawyer represent you" simply did not satisfy the duty to make a "searching inquiry".

Interestingly, the only accounting of dangers of *pro se* representation that found its way into the record was that contained in an excerpt the defendant read from *Gideon v Wainwright* (372 US 335) months after Carpenter had been relieved.[3] Though on its face this language could be deemed most informative, there is no way of telling whether and to what extent the defendant appreciated its significance, or whether he was doing no more than reading uncomprehended language supplied to him by another. Unexplored by a cross-current of colloquy, we are left in the dark.

Finally, since there is to be a new trial, for the guidance of the Trial Court should the situation arise again, we now comment on the matter of "standby counsel". It will be remembered that the Trial Court rejected Assistant Public Defender Carpenter's suggestion, made after reporting on defendant's mistrust, that alternate counsel be appointed to follow the case and be present at all proceedings. On

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3. The defendant made the following statement during discovery proceedings held on July 19, 1978:

> "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (See *Gideon v Wainwright*, 372 US 335, 344-345).

this point, we agree, particularly in a case as serious as the one here, that where a defendant decides on self-representation, a judge "may even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary" (*Faretta v California, supra,* p 835 n 46). It may be advisable to do so, to protect the defendant and to facilitate the trial, not only in serious cases, but "in cases expected to be long or complicated or in which there are multiple defendants" (The ABA Standards for Criminal Justice [2d ed], Special Functions of the Trial Judge, Standard 6-3.7)

Accordingly, the order of the Appellate Division should be affirmed.

JASEN, J. (dissenting):

I vote to reverse. By repeatedly rejecting, without good cause, the services of the only attorney to which he was constitutionally entitled, defendant waived his right to counsel. On this point, I am in complete agreement with the views expressed in the dissenting opinion of Justice Richard D. Simons at the Appellate Division. (83 AD2d 205, 210-216.) I find it necessary, however, to comment briefly on the rationale employed by the majority in needlessly sustaining the reversal of defendant's conviction for the brutal murder of a teenage girl.

At the outset, certain facts should be noted. It is not contended that Bruce Carpenter, the Chief Assistant Public Defender assigned to represent the defendant, is other than an experienced, qualified and highly respected trial attorney. At no time in the course of these proceedings

has defendant offered a valid reason for not accepting his services as counsel. Indeed, the record suggests that defendant's refusal to accept Carpenter as his attorney was more the product of appellate counsel's dissatisfaction with the political turnover in the Public Defender's office than any real concern over defendant's constitutional right to full and fair representation at trial.

Be that as it may, defendant at the time of trial was 31 years old and by no means unfamiliar with the criminal justice system. Not only had he served time on prior felony charges, but he was involved in a lengthy extradition proceeding in the State of Maine which ended in his return to this State to face the present murder charges. On both these occasions, defendant was represented by counsel and, as a result, fully exposed to the role played by an attorney in the course of a criminal proceeding.

Although defendant was indigent, there is no indication that he was ignorant or that he lacked a basic understanding of the English language. In fact, the record is directly to the contrary. On each of the several occasions that he was confronted with the choice of either accepting Carpenter or proceeding *pro se,* defendant, while adamantly refusing the Public Defender's assistance, continuously professed an inability to represent himself. Such self-proclaimed incompetence is some indication that he was aware of and appreciated the dangers involved in not being represented by a lawyer at trial. Furthermore, the court specifically advised defendant of the seriousness of the charges he was facing and the term of life imprisonment that could follow upon conviction. In addition, defendant, in the course of his opening statement, expressly acknowledged that "[t]he law is very complex", that "[a] man

has to go through many years of schooling before he can become a lawyer" and asked the court how it expected him "to do this in a few months".

Beyond this, the clearest indication of defendant's subjective appreciation of the risks involved in *pro se* representation came from his own mouth. At one point in the pre-trial proceedings, the defendant addressed the court as follows:

> "I'm not familiar with the proceedings going on here, and I have tried, to the best of my ability, to understand what's happening, and something I have read, a Supreme Court Decision, Gideon vs Wainwright: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence' (See *Gideon* v *Wainwright*, 372 US 335, 344-345)."

Nevertheless, the majority has concluded that a new trial is in order because "the Trial Court did not ascertain that the defendant appreciated the risks of self-representation." (—— NY2d —— [slip op, at p 7].) Yet, I know

of no case in which such a clear articulation on the pitfalls of *pro se* representation has come from the lips of the defendant himself. The majority blithely passes over this part of the record with the unfounded suggestion that there is no way of telling whether defendant understood the significance of what he was saying or whether he was merely "reading uncomprehended language supplied to him by another." (—— NY2d —— [slip op, at p 9].) Such a view is not only highly speculative, but wholly unrealistic. The defendant's recitation concerning the dangers of self-representation provides a far clearer indication of his personal appreciation of the particular risks involved than if the court had uttered the warnings and the defendant merely acknowledged his understanding by a simple "yes".

Nor is there any possibility that further dialogue between the court and the defendant concerning the dangers of self-representation would have altered defendant's unyielding position concerning Carpenter's assistance at trial. On numerous occasions throughout these proceedings, defendant made it clear that he would accept no attorney from the Public Defender's office. Under the circumstances, further questioning by the trial court of the type suggested by the majority would have been futile. On this record, I can only conclude that defendant fully appreciated the danger of proceeding *pro se* and, despite the risks involved, refused the assistance of court-appointed counsel.

No constitutional rights will have been protected by ordering a new trial in this case. Rather, by sanctioning the type of gamesmanship practiced here, this court's decision will only serve to further undermine public confidence in the criminal justice system. No defendant faced with the constitutionally permissible choice of either accepting

competent, court-appointed counsel or proceeding *pro se* should be able to straddle both rights and, in so doing, frustrate the course of a criminal trial. As one court has aptly noted: "[W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of assigned counsel. * * * [H]e may not use this right to play a 'cat and mouse' game with the court * * * or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." (*Kates* v *Nelson*, 435 F2d 1085, 1088-1089, quoting *United States ex rel. Davis* v *McMann*, 386 F2d 611, 618-619 [citations omitted].)

Having clearly and unequivocally rejected the only attorney to which he was constitutionally entitled, the sole option that remained was for the defendant to represent himself. He should now be bound by that election. Instead, he is given an unwarranted, second opportunity to put the People to the task of establishing his guilt at trial, five years after the crime was committed. Since it is likely that defendant will not have any different or better counsel on the retrial than was available to him at the first trial, I fully agree with Justice Simons that "[n]either justice nor the appearance that justice has been done is satisfied by such a result." (83 AD2d at p 216.)

* * *

Order affirmed. Opinion by Judge Fuchsberg in which Chief Judge Cooke and Judges Jones and Meyer concur. Judge Jasen dissents and votes to reverse in an opinion in which Judges Gabrielli and Wachtler concur.

Decided July 2, 1982

Order of Reversal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Present:

SIMONS, J.P., HANCOCK, DENMAN, MOULE, SCHNEPP, JJ.

People of the State of New York,

Respondent,

v

Robert E. Sawyer,

Appellant.

The above named Robert E. Sawyer having appealed to this Court from a judgment of the Chautauqua County Court, entered in the Chautauqua County Clerk's office on October 30, 1978 and said appeal having been argued by Charles Fagan of counsel for appellant, John Ward of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is reversed on the law and facts and a new trial is granted.

Opinion by Schnepp, J., which is hereby made a part hereof.

All concur, except Simons, J.P. and Moule, J., who dissent and vote to affirm the judgment, in an Opinion by Simons, J.P.

Entered: Nov. 13, 1981

MARY F. ZOLLER, *Clerk*

Opinion

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

ROBERT E. SAWYER,

Appellant.

Decided September 26, 1978

836 45 NEW YORK REPORTS, 2d SERIES

Appeal dismissed, without costs, by the Court of Appeals *sua sponte*, upon the ground that it does not lie.

Opinion of the Appellate Division Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

ROBERT E. SAWYER,

Appellant.

SCHNEPP, J.

After a trial by jury defendant Robert E. Sawyer was convicted of common-law murder in the second degree (Penal Law, § 125.25, subd 1) and felony murder in the second degree (Penal Law, § 125.25, subd 3), and sentenced to an indeterminate term of 25 years to life imprisonment. He appeals essentially on the ground that he was denied his right to counsel at trial.

In our analysis it is unnecessary to consider the facts bearing on the commission of the crime itself and we limit our consideration to the events relating to the claimed impairment of the right to counsel. Following his indictment on the two counts of second degree murder and two counts of robbery for the shooting death of a cashier at a grocery store, the defendant was arraigned, informed of his right to counsel, and given one week to retain an attorney. On March 9, 1978 he appeared before the court with attorney

Charles E. Fagan who informed the court that he was not presently retained to represent the defendant. Fagan inquired, however, about possible conflicts of interest involving the recent transfers of Mr. Ronald Gibb from the Public Defender's office to the District Attorney's office and Mr. Richard Slater from the District Attorney's office to the Public Defender's office. The court stated that there was no conflict of interest created by the transfers because a disassociation had been ordered. The court indicated that if the defendant had evidence bearing on any violation of its order it would hear the matter. The claim that Gibb's transfer to the District Attorney's office created a conflict of interest was not referred to again or developed on the record. On this appeal we concern ourselves solely with the contention that Slater's transfer to the Public Defender's office created a conflict of interest with regard to the defendant's case.

On March 16 the defendant and Fagan appeared again before the court. Upon being informed that the defendant was indigent, the court appointed Mr. Bruce Carpenter of the Public Defender's office to represent him. Defendant refused to consent to the assignment stating, "I don't want the Public Defender". Thereafter, defendant in a letter to the court rejected Carpenter's services. On March 20, at his next court appearance with Carpenter, defendant reiterated his objection to representation by the Public Defender but stated that he nonetheless wanted counsel. The court denied defendant's claim that he had the right to refuse the lawyer assigned by the court and to have specific counsel appointed. Carpenter indicated that the defendant

had refused to co-operate with him, and requested that the court appoint an attorney to be in the courtroom with defendant to follow the case. This the court refused to do. Carpenter said that apparently defendant was echoing a previous argument of Fagan that defendant was entitled to assigned counsel of his choice. The assignment of Carpenter was continued. On March 22 defendant again advised the court that he wanted a lawyer, but that he could not accept the Public Defender, and, thus, he was unable to plead because he did not have counsel. The court entered a plea of not guilty on defendant's behalf. Some colloquy then ensued between the court and defendant during which the court stated, "I am giving you another chance. You may make your own choice. One, represent yourself. Two, be represented by the Public Defender. You have no other choice". The defendant answered that he was not competent to defend himself. On his next court appearance the defendant again expressed his unwillingness to accept the representation of the Public Defender. The court then relieved Carpenter of his assignment and noted for the record that the defendant would represent himself.

Throughout the remaining pretrial proceedings defendant was not represented by counsel. On October 3 defendant met with the court prior to jury selection and was given another chance to accept Carpenter as his attorney. Defendant rejected this offer, restated his desire for counsel, and claimed again that he was not competent to represent himself. Further, he declared that the court had appointed incompetent counsel and that Carpenter did not have a desire to defend him. The court advised defendant that Carpenter had no conflicts in the case and that he was an

able lawyer, ready and willing to represent the defendant. Thereafter, the trial began. Defendant was not represented by counsel. In his opening statement he complained about being "forced" to represent himself and the over-all unfairness of the proceedings. Although he denied his guilt, defendant did not actively participate at the trial.

We hold that the court, which properly denied defendant's request for a new counsel, committed reversible error in relieving the Public Defender of his assignment to represent defendant and in thus depriving defendant of his right to counsel at the trial.

It is well established that a criminal defendant has the right to retain an attorney of his own choosing (*People v Arroyave*, 49 NY2d 264, 270), but this right does not encompass the right to an appointed counsel of his choice. "[A]s long as assigned counsel are men of ability and integrity, the discretion and responsibility for their selection rest with the court, to be exercised free of outside interference" (*People v Brabson*, 9 NY2d 173, 181). This is not to suggest that an indigent's request for new counsel should be treated casually. Where good cause is shown, assigned counsel should be substituted (*People v Medina*, 44 NY2d 199, 207).

Good cause did not exist in this case. The claim that a conflict of interest was created by Slater's former employment in the District Attorney's office is without merit. We are cognizant of the holding of the Court of Appeals in *People v Shinkle* (51 NY2d 417) that the transfer of a Public Defender to the District Attorney's office creates a conflict of interest which constitutes a per se disqualifica-

tion of the entire District Attorney's staff from prosecuting a defendant who has been previously represented by the former Public Defender. *Shinkle* has no application, however, to the converse situation which creates no appearance of impropriety or opportunity for abuse of confidence. The danger that previously obtained confidential information will become available to the prosecution simply does not exist when a District Attorney becomes a Public Defender. We conceive of no prejudice to defendant resulting from Slater's former employment; and, indeed, the defendant makes no such claim. Therefore, in the absence of a conflict of interest the court acted properly in denying defendant's request for a change of counsel and in giving him the choice of either accepting the representation by Carpenter or deciding to proceed *pro se*. Defendant chose to do neither. He asserted that he did not want to be represented by a Public Defender, but, at the same time, claimed that he was not competent to represent himself and insisted upon the appointment of an attorney. The court construed these seemingly contradictory representations as a waiver of the right to counsel by defendant and an insistence to proceed *pro se*. They were not.

Clearly, defendant did not meet the requirements that the Court of Appeals has stated for the right to appear *pro se:* "A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues." (*People v McIntyre*, 36 NY2d 10, 17.) In fact, defendant never re-

quested to represent himself. He insisted throughout the pretrial proceedings and during the course of the trial itself that he was incompetent to represent himself. And once the trial began, he did nothing to assist his defense except to deny having committed the crime (cf. *People v Yates*, 45 AD2d 778).

This case is in many ways similar to *People v Kelly* (60 AD2d 220, affd 44 NY2d 725). In *Kelly* assigned counsel requested to be relieved of his assignment because the defendant told him that he wanted "Allah" as his attorney. When asked by the court if that was his wish, defendant responded that "Allah" would advise him. The First Department, citing *People v McIntyre* (36 NY2d 10, 17, *supra*), ruled that, in view of the defendant's responses that he wanted his attorney dismissed but did not want to represent himself, the court had no choice but to deny defense counsel's request to be relieved of counsel and to continue the representation of defendant by his assigned counsel (*People v Kelly*, 60 AD2d 220, 224, *supra*).

This is precisely the course which the court should have taken in this case (see *United States ex rel. Testamark v Vincent*, 496 F2d 641). Despite defendant's insistence that his attorney be dismissed, he clearly did not want to represent himself. The conviction of an indigent defendant cannot stand if he was not represented at trial, unless there has been an intelligent and competent waiver of counsel (*Faretta v California*, 422 US 806). Carpenter should not have been relieved of his assignment. Defendant did not waive his right to counsel.

This is not the situation, as the dissent suggests, where the defendant's "refusal without good cause to proceed

with able appointed counsel is a 'voluntary' waiver" (*Maynard v Meachum*, 545 F2d 273, 278). A defendant may be properly given the choice of co-operating with his appointed attorney, or representing himself. That decision, however, is personal to the defendant. Here the court itself, when it relieved competent counsel in advance of trial, made the decision that defendant would defend himself.

Accordingly, the judgment of conviction should be reversed and a new trial granted.

SIMONS, J.P. (dissenting). The judgment should be affirmed. Defendant made a knowing and constitutionally acceptable election to proceed *pro se* when he refused to accept properly assigned counsel without good cause. That he also stated that he did not wish to represent himself and his decision was constrained by the court's ruling does not alter the fact that he "voluntarily" chose by default one of the only two alternatives available to him. The right to counsel and the right to proceed *pro se* are "two faces of the same coin" (*United States v Plattner*, 330 F2d 271, 276) and defendant must elect (or, if you wish, waive) one or the other; he cannot have it both ways.

The majority rejects defendant's claim that assigned counsel was disqualified, but it holds that the court committed reversible error as a matter of law by not directing the unwanted attorney to remain available in the courtroom to advise defendant during the trial. In so holding, it relies on *People v Kelly* (60 AD2d 220, affd 44 NY2d 725). That decision, however, is inapposite. The court in *Kelly* did not hold that the court was required to direct advisory counsel to remain in the courtroom during trial in cases

such as this—only that it was not error to do so. In fact, the trial court considered such a solution here but decided against it. We think that it was correct in its decision. Ordering counsel to remain in the courtroom may have been an appropriate exercise of discretion under the rule in *Kelly*, but it was not mandatory, and the court's failure to do so did not constitute reversible error. The only question on this appeal is whether defendant properly exercised his right to assistance of counsel or waived it. The court's assignment or failure to assign a lawyer to remain in the courtroom would not alter that determination, for if defendant did not waive his right to counsel a direction that counsel remain available throughout the trial would not correct the situation and accord defendant the full representation to which he was constitutionally entitled.

Some background is necessary. Most of the facts are found in the record but a few additional and undisputed details which aid understanding are supplied in defendant's brief.

On February 11, 1977 a teen-age girl, Jeanne Humm, was shot twice in the head and killed during the robbery of Hogan's Hut, a grocery store in Stow, New York. As a result of the crime, defendant was indicted for two counts of murder, second degree, and two counts of robbery, first degree. He was eventually located in Maine, extradited to New York and after a jury trial was convicted of two counts of murder, second degree. The crime was unwitnessed but the People convincingly established defendant's guilt through the evidence given by 36 witnesses and contained in 45 exhibits.

When defendant first appeared in court on March 2, 1978, the matter was adjourned so that he might obtain counsel. He appeared a week later with Charles Fagan, his counsel on this appeal. Defendant had not retained Fagan because he was indigent, but Fagan appeared for him (and apparently other indigent defendants as well) as "informal" counsel pending the court's assignment. Before January 5, 1978 Fagan, a Democrat, had been the Public Defender of Chautauqua County. On that date the County Legislature replaced him by appointing the present incumbent, Richard Slater, a Republican and a former Assistant District Attorney.[1] Because of this change in the Public Defender's office, the trial court, by order of January 3, 1978, disqualified Slater from all the Public Defender's pending cases and it directed the Chief Assistant Public Defender, Bruce Carpenter, a hold-over employee with considerable trial experience, to handle those files and to insure that Slater had nothing to do with them. Nevertheless, when Mr. Fagan appeared with defendant in March, he asserted generally that a conflict existed in the Public Defender's office which required the assignment of alternative, outside counsel to represent defendant. The same grounds were to be repeated in several subsequent court appearances and in letters to the Judge from defendant. The court denied defendant's request and assigned Mr. Car-

1. Sometime during the period involved, an Assistant Public Defender, Ronald Gibb, was hired by the District Attorney's office as an assistant. The record does not establish dates or details of the change (see majority opn, p 206). That change in personnel may be the basis for a posttrial application, but the precautionary steps ordered by the court to avoid prejudice to defendant apparently complied with the law at the time (see *People v De Freese*, 71 AD2d 689; *People v Cruz*, 60 AD2d 872; cf. *People v Shinkle*, 51 NY2d 417).

penter to represent him. It stated to defendant and Mr. Fagan, however, that it would consider specific allegations of conflict or other grounds for change of counsel or, alternatively, that it would direct assignment of counsel from the Public Defender's office other than Mr. Slater or Mr. Carpenter, if defendant wished. The court refused to appoint outside counsel, however, because it found no ground necessitating that it subject the county to additional expense by doing so.

This impasse continued through several court appearances extending over several months. The position of defendant never changed despite the court's ruling. Although defendant's claim of prejudice because of the conflict was never supported orally or by formal motion papers, he repeatedly asserted that he refused to "consent"[2] to the assignment of the Public Defender's office but insisted nevertheless, that he required an attorney because he was incapable of defending himself.

Finally, in May, 1978, still refusing to accept the assignment of the Public Defender, defendant brought a *pro se* proceeding in the Appellate Division seeking new assignment of counsel and an order enjoining the trial court from proceeding. Although we denied that application on May 15, 1978, defendant continued to assert that he had a legal right to new counsel and that he was incapable of defending himself. He refused to co-operate with the Assistant Pub-

2. Section 717 of the County Law provides in part: "1. The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the *consent of the defendant*, each indigent defendant" (emphasis added). Defendant apparently believed this statute gave him a veto power over the assignment of the Public Defender.

lic Defender or to discuss his case with him. Finally, when ordered to trial, defendant refused the assistance of the Public Defender and subsequently, during *voir dire* of the prospective jurors, he asked that he be excused from the proceedings.

This conduct in the face of the court's ruling (a ruling which we have unanimously upheld on the two occasions we have considered it) constituted a valid waiver of counsel.

The right of a criminal defendant to assistance of counsel is guaranteed by the Federal and State Constitutions (US Const, 6th, 14th Amdts; NY Const, art I, § 6). Once viewed as little more than the right to the assistance of retained counsel, it is now clear that in most cases a defendant is not only entitled to counsel but also that he is entitled to have legal assistance supplied to him at public expense if he is indigent and cannot retain his own lawyer (see *Argersinger v Hamlin*, 407 US 25; *Gideon v Wainwright*, 372 US 335; *Powell v Alabama*, 287 US 45; see *People v Arroyave*, 49 NY2d 264, 270; *People v Brabson*, 9 NY2d 173). Moreover, although an indigent defendant is not entitled to counsel of his choice, he may request and receive a new assignment for good cause (*People v Medina*, 44 NY2d 199, 207).

The other side of the coin is that a criminal defendant has a constitutional right to waive counsel and represent himself (see *Faretta v California*, 422 US 806). This right has been recognized by the courts with some misgivings stemming from two disparate considerations, the understandable apprehension that a defendant may harm his cause through ignorance or inexperience and concern over preserving the procedural integrity of the trial and public

confidence in the judicial process. Stated another way, the courts, quite properly, must ensure not only that justice is done but that it appears to be done. The right of self-representation cuts against these considerations because it is an unusual defendant who is competent to provide himself with a proper defense. Nevertheless, a defendant may represent himself in spite of his lack of expertise, because the right to determine one's own destiny is one of the most cherished principles in our culture (see *People v McIntyre*, 36 NY2d 10, 14). A defendant is entitled to be master of his own fate and "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open'" (*United States ex rel. Maldonado v Denno*, 348 F2d 12, 15). Regardless of the rashness of the choice, it is clear that a defendant's election to proceed *pro se* may not be denied solely because he is unschooled in the law or unfamiliar with the courts.

In the usual case, the defendant requests the right to represent himself. That being so, the court is concerned not only with the question of waiver but also the timeliness of his request and his conduct (see, generally, *People v McIntyre*, 36 NY2d 10, *supra*, and cases cited therein). In this case, however, where the election is imputed to him, the court is concerned only whether it appears from the surrounding facts and circumstances that defendant has intentionally abandoned a known right or privilege (see *Johnson v Zerbst*, 304 US 458, 464; see also, *Faretta v California*, 422 US 806).

We have no difficulty in looking behind the words of this defendant and, after examining his actions, determining

that he elected to proceed without counsel. At the time of trial defendant was 31 years old and not unfamiliar with the criminal justice system. He was advised repeatedly of his rights and of the alternatives available throughout the proceedings. Nothing in the record suggests that he did not understand the court's rulings or the alternatives open to him—only that he disagreed with them. Moreover, he was aware that the alternative to his rejection of the Public Defender was a *pro se* defense without counsel in the courtroom to advise him in an emergency. Knowing all this, he refused the assistance of assigned counsel. We see no reason why he should not be charged with the consequences of his acts just as other defendants have been charged with waiving their constitutional rights because of their disorderly conduct (see *Mayberry v Pennsylvania*, 400 US 455 [self-representation]; *People v Palermo*, 32 NY2d 222 [confrontation]), or because they failed to participate in the trial (see *People v Aiken*, 45 NY2d 394 [confrontation]). Defendant's conduct was deliberate and calculated and it was sufficient to establish a knowing and voluntary waiver of his right to counsel. As another court has said, the waiver must be the product of free and meaningful choice but "[t]his does not mean that the decision must be entirely unconstrained. A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver and another course of action as long as the choice presented to him is not constitutionally offensive * * * The record in this case indicates that, while [defendant] did not affirmatively wish to represent himself, when given a clear choice between proceeding with counsel already appointed or going pro se, he elected the latter * * *

His decision was therefore 'voluntary' unless that choice placed him in a dilemma of constitutional magnitude" (*Maynard v Meachum*, 545 F2d 273, 278; see, also, *United States ex rel. Testamark v Vincent*, 496 F2d 641, 643-644, cert den 421 US 951).

The second consideration, that it appear justice has been done, has undoubtedly influenced the members of the majority in their decision. Thus, they hold that if the court had only continued Carpenter's assignment and directed him to remain in the courtroom, there would be no ground for reversal; in effect they hold that the appearance, if not the fact of legal assistance, would have been satisfied by that course of action. We agree that the presence of trial counsel, even if unheeded by defendant, may serve several legitimate purposes. Not the least of these is that counsel's presence permits the Trial Judge to preside with detachment, whereas, without counsel the Judge may be confronted with the need to help an obviously confused or misguided defendant, or conversely, to interrupt or quiet one who has gotten out of control. In either case, the Judge may be required to "get into the case" with a consequent risk of committing error or appearing biased. Moreover, the presence of assigned counsel, even if unwanted and unused, gives a ready answer to critics—that we have done everything possible. But while the presence of a lawyer, unwanted and unused by the defendant, may be helpful to the court in these troublesome cases, the lawyer can hardly fulfill defendant's constitutional rights to assistance and the issue before the appellate court must narrow down to a question of waiver. In this case defendant continuously refused to discuss the case with Mr. Carpenter and his

election to proceed *pro se* was made after the court had stated that no counsel would be present during trial. Under the circumstances, defendant waived the right to claim on this appeal that the court erred in excusing counsel from the case.

Finally, we are constrained to add that we are at a loss to know what purpose will be served by this reversal. Since we have twice approved Mr. Carpenter's assignment, the trial court, on remittitur, may properly assign him again. Thus, the case will be retried almost five years after the crime (if the People's extensive circumstantial evidence can be reassembled) without defendant having any different or better legal assistance than was available to him at the first trial. Neither justice nor the appearance that justice has been done is satisfied by such a result. The reasonable interpretation of defendant's conduct here is that he waived his right to counsel at the time of trial and he should be held to that election on this appeal.

The judgment should be affirmed.

HANCOCK, JR., and DENMAN, JJ., concur with SCHNEPP, J.; SIMONS, J. P., and MOULE, J., dissent and vote to affirm the judgment in an opinion by SIMONS, J. P.

Judgment reversed, on the law and facts, and a new trial granted.

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SUPREME COURT OF THE UNITED STATES

October 1982 TERM

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL SAWYER,

Respondent.

RESPONDENT'S BRIEF IN REPLY TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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NATURE OF THE CASE

The Respondent, ROBERT EARL SAWYER, appealed to the Appellate Division, Fourth Department, State of New York, from a judgment of the County Court, County of Chautauqua, State of New York, rendered on the 30th day of October, 1978, convicting him of the crimes of Common-law Murder, 2nd Degree (Section 125.25(1) PL) and Felony Murder, 2nd Degree (Section 125.25(3) PL), after a jury trial before the Honorable Lee Towne Adams. The court sentenced the Respondent to an indeterminate term of twenty-five (25) years to life imprisonment. By order dated November 13, 1981, the Appellate Division, Fourth Department, reversed Respondent's conviction on the law and facts and ordered a new trial. The People of the State of New York, appealed to the New York Court of Appeals which by order dated July 2, 1982, affirmed the Appellate Division's order reversing the Respondent's conviction.

STATEMENT OF FACTS

The Respondent was indicted on two counts of 2nd Degree Murder and two counts of Robbery by the Chautauqua County Grand Jury resulting from an investigation into the shooting death of Miss Jeanne Humm at Hogan's Hut grocery store in Stow, New York on February 11, 1977. He was arraigned before the Chautauqua County Court Judge, Lee Towne Adams, on March 2, 1978. At that time, the Respondent did not have an attorney and received a one week adjournment for the purpose of retaining one. On March 9, 1978 the Respondent again appeared before Judge Adams, this

time with Charles Edward Fagan, Esq., as his spokesman. The Court inquired as to whether Mr. Fagan was Respondent's counsel. Mr. Fagan, rather than committing himself to such representation, explained that he had been retained by Defendant's family to pursue the representation question as it applied to Sawyer and requested an explanation from the court as to an apparent conflict of interest between the Chautauqua County Public Defender's office, the District Attorney's office and the particular case against the Respondent. The Chautauqua County Public Defender's office had recently undergone a change in top-level management, as Democratic-appointee Fagan was replaced by Republican-appointee, Richard V. Slater, Esq., on or about January 5th, 1978. Immediately prior to his appointment as Public Defender, Mr. Slater had been associated with the Chautauqua County District Attorney's office, as Chief Assistant District Attorney, and in the changeover had been privy to files and materials in the investigation resulting in the Defendant's indictment. Additionally, and importantly, Ronald J. Gibb, Esq., an Assistant Public Defender during the investigation stage who was also privy to Defendant's case material, had been transferred into the District Attorney's office.

Despite this changeover and blending of staff personnel, which created new allegiances and loyalties, the trial court ruled that no conflict existed because an earlier order by Adams disassociating Slater from the case had resolved the conflict. However, the Court offered neither the Respondent nor Mr. Fagan any explanation of that order. In fact, the actual order of

disassociation was never related to the Respondent in any form. The case was further adjourned.

On March 16, 1978, the Respondent and Mr. Fagan again appeared before Judge Adams and formally declared indigency, prompting the Court to assign Bruce K. Carpenter, Esq., in his capacity of an Assistant Public Defender to represent Sawyer. Still sensing a climate of unexplained conflicting interests and uncertain loyalties, the Respondent voiced his objection to being represented by the new Public Defender's office or anyone connected with it. Nevertheless, the case was adjourned with Mr. Carpenter listed as the attorney of record for Respondent.

On March 20, 1978 the Respondent again in open court requested assigned counsel and made strenuous objection to Mr. Carpenter or any Public Defender being made permanent counsel. He declared his incompetency in representing himself and requested the appointment of Mr. Fagan. Even Mr. Carpenter noted the Respondent's mistrust and lack of cooperation and suggested that the court appoint alternate counsel to follow the case and be present at all proceedings. The court denied these requests and the case was further adjourned.

Between court appearances the Respondent continued to refuse to cooperate with the Public Defender's Office or Mr. Carpenter, sending messages to Judge Adams stating that he did not really want their services. (Subsequent civil suits initiated by Respondent for privacy violations during this time have been settled out of court.)

On March 22, 1978, in response to the Respondent's statement "I cannot plead" (either guilty or not guilty), the Court declared the Respondent had waived his right to counsel, entered a not guilty plea on his behalf, and relieved Assistant Public Defender Carpenter as attorney of record.

Respondent went so far as to bring an Article 78 proceeding against Judge Adams in May 1978, seeking Appellate Division supervision and assignment of trustworthy counsel outside the Public Defender's office. This relief was denied on May 15, 1978, and Respondent was left without trained counsel.

Through all subsequent proceedings, including trial and sentencing, the Respondent refused Carpenter's assistance and requested counsel free from the perceived taint of conflict. On several occasions, without explaining the issue to the Respondent, the Court again ruled that a conflict of interest did not exist and refused to appoint former Public Defender Fagan or any other attorney to assist Respondent as an alternative to Mr. Carpenter. Throughout the proceedings Respondent asserted his own incompetence as well as his distrust of the Public Defender's staff under former Assistant District Attorney Slater.

During the trial itself, which commenced on October 3, 1978, and terminated on October 20, 1978, the Court made few attempts to minimize the prejudice resulting to Respondent from lack of professional assistance. While the Respondent was assisted with evidence discovery and granted an independent investigator, he was not kept fully advised on all the rules of evidence and proved

incapable of cross-examining witnesses or posing objections to improper or leading questions. He remained unaware of his right to assert the spousal privilege against the prosecution's key witness, Respondent's wife, Muchell Sawyer. His "Closing Argument", after presenting no case on his own behalf, was little more than a reiteration of his own incompetence and desire for trustworthy counsel. As noted above, he was found guilty on two counts of murder and sentenced to twenty-five (25) years to life imprisonment. Respondent appealed his conviction to the Appellate Division, Fourth Department, which reversed his conviction on the law and facts and granted a new trial. Said reversal was affirmed by the New York Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

State courts have the ongoing obligation of construing and applying the Federal Constitution and federal laws. While the Supreme Court is an appropriate arbiter of federal law, it is a well-settled practice of the United States Supreme Court not to review state decisions which have sufficient independent grounding in state law. (Black v. Cutter Laboratories, 351 U.S. 292, (1956) rehearing denied 352 U.S. 859 (1956)). This is a case grounded in New York State law, in spite of the fact that the People in their Petition for a Writ of Certiorari would make a federal case out of it. This most important, and most difficult limitation on Supreme Court review of state court decisions was well stated by Justice Jackson in 1945:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.*** The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 125-126(1945).

For the reasons stated below, it is clear that New York has established an independent and adequate state ground on the issue of pro se representation.

It is significant that in 1974, one year before the United States Supreme Court espoused its own "eyes open" standard in pro se representation in Faretta v. California, 422 U.S. 816 (1975), the New York Court of Appeals decided People v. McIntyre, 36 N.Y.2d 10 (1974). The timing is significant because even before the Supreme Court spoke, New York began to develop its own body of law on the subject of pro se representation. Petitioner did not address McIntyre in its brief. McIntyre held that a defendant's exercise of the right to proceed pro se must be, inter alia, "knowing and intelligent." The Court in McIntyre went on to say that, "our Court need not reach the question of whether the right to defend pro se is founded in the Federal Constitution because the New York State Constitution and criminal procedure statute clearly recognize this right." Id. at 15. In People v. Sawyer, the case at bar, the same Court, citing both federal and state law, found such a knowing and intelligent election lacking when confronted with a unique situation: Can a defendant who rejects appointed counsel and desires alternate counsel be deemed to have knowingly and intelligently waived counsel when he is compelled to proceed pro se? The Court, relying on the New York rule, held in the negative and also found that "standby counsel" should have been appointed. The issue of "standby counsel" was recently addressed again by the Court of Appeals in People v. Mirenda, _____ N.Y.2d _____ (1982). In Mirenda, the Court once again cited both federal and state constitutional law and found that the defendant knowingly and intelligently

elected to proceed pro se and that as a result there was no right to standby counsel.

Obviously the issues and side issues surrounding pro se representation abound. The High Court was arguably aware of this hodgepodge when it announced its "eyes open" standard for pro se representation in Faretta v. California. That standard is now attacked on the grounds of "vagueness." If indeed it is vague, there was wisdom in that vagueness for no court could reasonably foresee the vast array of situations in which a defendant might elect or be compelled to proceed pro se. The "eyes open" standard should be construed as a minimally acceptable guidepost for state court decisions on the subject of pro se representation. Certainly the Supreme Court has often recognized that reversal of state decisions grounded in state law do nothing more than increase litigation. As early as 1954, it was reported that in 11 terms, some 46 Supreme Court reversals of state decisions required additional litigation. "In slightly less than half of these cases the party successful in the Supreme Court was unsuccessful in the State Court following the remand." Note, "Congressional Reversal of Supreme Court Decisions, 1945-1957," 73 Harvard Law Review 1324 (1958). A hands-off policy is a wise practice since a reversal of state determinations of state issues frequently results in additional litigation without affecting the final outcome of cases.

McIntyre and its progeny clearly demonstrate independent and adequate New York State grounds on the issue of pro se representation. However, assuming arguendo that the High Court fails

to find an independent state ground, certiorari should still be denied on the grounds that this line of cases points out something equally significant: They demonstrate the explosive and controversial side issues associated with pro se representation, i.e., choice of counsel, standby counsel, and conflict of interest issues (See People v. Shinkle, (51 N.Y.2d 417), a decision resting on New York case law). These issues, like pro se representation, are often uniquely state grounded and are therefore better dealt with by the States. (Note: The issue of choice of counsel will be addressed in part by the Supreme Court this term in Slappy v. Morris, 649 F.2d 71 (9th Cir. 1981), a far better case than Sawyer to deal with such an issue.)

CONCLUSION

The People would ask the Court to set mandatory and impractical guidelines in an area necessitating discretion. This Court would be ill advised to enter an area so volatile and controversial. The decision to order choice of counsel, standby counsel, or pro se representation is better left to the States where various facts and unclear records can be more effectively deciphered.

Dated: November 18, 1982

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October 1982 TERM

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL SAWYER,

Respondent.

Motion for Leave to Proceed In Forma Pauperis

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

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ROBERT EARL SAWYER,

Respondent.

Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis

STATE OF NEW YORK)
)SS.:
COUNTY OF Wyoming)

I, Robert Earl Sawyer, being duly sworn, depose and say:

1. That I am the Respondent in the above action which is a proceeding wherein the Petitioner is seeking a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

2. That throughout the lower court proceedings I was indigent and therefore unable to retain counsel to represent me in said proceedings. Consequently, I received assistance of assigned counsel at both New York State appellate levels pursuant to court order.

3. That since I remain incarcerated, I am still unable to retain counsel and, therefore, seek this motion to proceed in forma pauperis in the above proceedings.

4. That I am not employed; nor have I received any income within the past 12 months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources; nor do I have any cash or checking or savings accounts; nor do I own any real estate, stocks, bonds, notes, or other valuable property.

5. That because of my poverty I am unable to pay any of the costs of the above proceeding and therefore request that I not be required to prepay fees, costs of give security therefor.

6. That I understand that a false statement herein will subject me to penalties for perjury.

Robert E Sawyer

ROBERT EARL SAWYER

Sworn to before me this

16 day of November, 1982.

William L. Reed

NOTARY PUBLIC

WILLIAM L. REED
Notary Public, State of New York
No. 60-[illegible] in Cayuga County
[illegible] Expires March 30, 19[illegible]